STATUTORY CONSTRUCTION……Revised September 2017

Table of Contents

I. STATUTES

A.R.S. § 1-211 provides the following general rules for construing Arizona law:

> A. The rules and the definitions set forth in this chapter shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature.
>
> B. Statutes shall be liberally construed to effect their objects and to promote justice.
>
> C. The rule of the common law that penal statutes shall be strictly construed has no application to these revised statutes. Penal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice.

See State v. Clow, 42 Ariz. 68, ¶ 15 (App. 2017)(defining the term "month" for purposes of continuing sexual abuse of a child under § 13-1417 in accordance with the fair import of the terms of the statute with a view to effect their object and to promote justice as required under § 1-211(C)).

A.R.S. § 1-211(C) is reiterated in the criminal code under A.R.S. § 13-104:

> The general rule that a penal statute is to be strictly construed does not apply to this title, but the provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law, including the purposes stated in section 13-101.[1]

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[1] A.R.S. § 13-101. Purposes: It is declared that the public policy of this state and the general purposes of the provisions of this title are:

> 1. To proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;
> 2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;
> 3. To define the act or omission and the accompanying mental state which constitute each offense and limit the condemnation of conduct as criminal when it does not fall within the purposes set forth;
> 4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each;
> 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized;
> 6. To impose just and deserved punishment on those whose conduct threatens the public peace; and [continued on next page]

However, where a statute provides a right in derogation of the common law, its terms are strictly construed. *State v. Hansen*, 237 Ariz. 61, 64, ¶ 5 (App. 2015)(appeals by state historically disfavored; thus, statute setting forth exclusive grounds on which the state may appeal provides right in derogation of common law and courts construe its terms strictly and presume the state has no right of appeal in absence of express legislative authority to the contrary).

A.R.S. § 1-212 provides that generally, headings to sections, source notes, reviser's notes and cross references are supplied for the purpose of convenient reference and do not constitute part of the law. *State v. Veloz*, 236 Ariz. 532, 537, ¶ 13 (App. 2015)(term "organized" in organized retail theft statute is only in the title and not an element of the offense; entire statute defines what constitutes "organized retail theft"). However, where an ambiguity exists the title may be used to aid in the interpretation of the statute. *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345, ¶ 13 (2014); *State ex rel. Romley v. Hauser*, 209 Ariz. 539, 542, ¶ 16 (2005).

A.R.S. § 1-213 requires courts to generally construe words "according to the common and approved use of the language," with the proviso that "technical words and phrases and those which have acquired a peculiar and appropriate meaning in the law shall be construed according to such peculiar and appropriate meaning." This refers to

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7. To promote truth and accountability in sentencing.

A.R.S. § 13-101.1 provides the following additional purpose:

In order to preserve and protect the rights of crime victims to justice and the right of the people to safety, it is a fundamental purpose of the criminal law to identify and remove from society persons whose conduct continues to threaten public safety through the commission of violent or aggravated felonies after having been convicted twice previously of violent or aggravated felony offenses.

"terms of art" that have "acquired a peculiar and appropriate meaning in the law."[2] A statute is thus interpreted according to the ordinary meaning of its terms, unless a specific definition is given or the context clearly indicates that a special meaning was intended. *State v. Lee*, 236 Ariz. 36 Ariz. 377, 382, ¶ 16 (App. 2014). When the legislature uses a word that has a well-known and definite meaning at common law, the court presumes the legislature used the word as it was understood at common law absent some other special meaning apparent from the text of the statute. *Allen v. Sanders*, 237 Ariz. 93, 94-95 ¶ 7 (App. 2015)(term "affinity" given well-understood, specialized common law meaning where term not defined in Victim's Bill of Rights or other statutes using that term).

By declining to define a statutory term, the legislature generally intends to give the ordinary meaning to the word*. Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 408 ¶ 18 (App. 2001). When statutory terms are undefined, the courts may reference dictionaries. *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 344 ¶ 9 (2014). Although the courts may consider dictionary definitions in construing words, they must consider their common meaning and ordinary usage in the context of the statutory scheme, and are not obligated to apply all possible definitions. *State v. Kendrick*, 232 Ariz. 428, 431, ¶ 11 (.App. 2013); *see also State v. Gray,* 227 Ariz. 424, 427, ¶ 9 (App. 2011)(recognizing dictionary definition may not be conclusive; because context gives

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[2] "Terms of art" include "appearance," *Lane v. City of Tempe*, 202 Ariz. 306, 308, ¶ 15 (2002); "probable cause," *State v. Smith*, 208 Ariz. 20, 24, ¶ 14 (App. 2004); and "consequential damages." *State v. Morris*, 173 Ariz. 14, 17, (App. 1992); *see State v. Hansen,* 237 Ariz. 61, 65 ¶ 8 (App. March 10, 2015), orders granting "mistrial" and "new trial" are distinct terms of art; State has right to appeal order granting new trial but not order granting a mistrial).

meaning, statutory terms should not be considered in isolation.) Additionally, in construing a legislative enactment, the court applies a practical and commonsensical construction. *State v. Pledger*, 236 Ariz. 469, 471, ¶ 8 (App. 2015). *See also State v. Clow*, 42 Ariz. 68, ¶ 15 (App. 2017)(defining the term "month" for purposes of continuing sexual abuse of a child under § 13-1417 in accordance with the fair import of the terms of the statute with a view to effect their object and to promote justice as required under § 1-211(C)).

A.R.S. § 1-214 provides specific rules for construing words expressing tense, number, and gender. It provides that words in the present tense include the future, words in the singular include the plural and vice versa, and words in either the masculine or feminine gender include the other gender and the neuter.

Unless the legislature provides otherwise, the term “Law” encompasses more than just statutes; it also includes constitutional provisions, the common law, and judicial decisions. *City of Tucson v. Clear Channel Outdoor, Inc*., 209 Ariz. 544, 553-554, ¶ 38 (2005).

II. RULES

The Arizona Rules of Criminal Procedure “govern the procedure in all criminal proceedings in all courts within the State of Arizona except that the Rules of Procedure in Traffic Cases shall continue to apply.” Criminal traffic violations fall under Title 28, Art. 3, A.R.S. §§ 13-1551-1561, and are governed by the Rule of Procedure in Traffic Cases and Boating Cases. Civil traffic violations fall under Title 28, Art. 4, A.R.S. §§ 13-1591-1602 and are governed by the Rules of Procedure in Civil Traffic and Civil Boating Violation cases. A civil traffic trial is informal, and technical rules of evidence do not

apply except for statutory provisions related to privilege. A.R.S. § 28-1596(D); Rule 17 Rules of Procedure for Civil Traffic and Civil Violation Cases.

Rule 1.1, Ariz. R. Crim. P. Criminal Rule 1.2 provides:

> These rules are intended to provide for the just, speeding determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.

Similarly, Rule 102, Arizona Rules of Evidence, provides: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."

In construing procedural rules promulgated by the Arizona Supreme Court, the court must employ the traditional tools of statutory construction. To determine the Arizona Supreme Court's intent in promulgating a procedural rule, the court looks first to the rule's plain language, considering particular provisions in the context of the entire rule. *Lopez v. Kearney ex rel. County of Pima*, 222 Ariz. 133, 136, ¶ 12 (App. 2009). Special rules of construction may apply; for example, rules concerning the disqualification of a judge are strictly construed. *Id.*, ¶ 11.

Rules and statutes should be harmonized wherever possible and read in conjunction with each other. If the plain language of a rule and a statute conflict, the court must determine whether the statute or the rule prevails. Under the Arizona Constitution, the legislature possesses those powers not expressly prohibited or granted to another branch of the government. Because the Constitution vests the power to make procedural rules exclusively in the Arizona Supreme Court, the legislature lacks

authority to enact a statute if it conflicts with or tends to engulf that court's rulemaking authority. Accordingly, when a statute and rule conflict, the court must inquire into whether the matter regulated can be characterized as substantive or procedural, the former being the legislature's prerogative and the latter the province of the court. *State v. Hansen*, 215 Ariz. 287, 289, ¶¶ 7-9 (2007)(scope of legislative rulemaking power under the Victims' Bill of Rights extends to those rules that define, implement, preserve, and protect the specific rights unique and peculiar to crime victims).

a. Juvenile Court Rules

Under Rule 1(A), Rules of Procedure for the Juvenile Court: “These rules govern the procedure for all matters in the juvenile court, including delinquency, incorrigibility, diversion, dependency, Title 8 guardianship, termination of parental rights and adoption.” Juvenile Rule 6 provides: “Proceedings as set forth in these rules, unless otherwise stated, shall be conducted as informally as the requirements of due process and fairness permit, and shall proceed in a manner similar to the trial of a civil action before the court sitting without a jury, except that the juvenile may not be compelled to be a witness in a delinquency or incorrigibility proceeding.”

Generally, the Arizona Rules of Criminal Procedure do no apply to juvenile court proceedings. The plain language of Rule 1.1, Ariz. R. Crim. P., provides that the Rules of Criminal Procedure apply only to criminal proceedings. Allegations against a juvenile are not criminal offenses but rather, pursuant to A.R.S. § 8–201(10), delinquent acts. Therefore, the application of the criminal rules to a juvenile proceeding conflicts with the plain language of Rule 1.1, Ariz. R. Crim. P. *David G. v. Pollard ex rel. County of Pima,* 207 Ariz. 308, 312, 314, ¶ 19 (2004)(city court judge, sitting as a juvenile hearing

officer, cannot apply the Rules of Criminal Procedure and order a jury trial, but must instead apply the procedures under Title 8). Nonetheless, Arizona courts apply the criminal rules to juvenile proceedings when appropriate to protect a juvenile's constitutional rights. Such an application is premised on concepts of due process, equal protection and fairness and not upon a belief that the rules governing prosecution of adults should apply. The Rules of Criminal Procedure only serve as a familiar vehicle to achieve due process ends. *In re Timothy M*., 197 Ariz. 394, 398, ¶ 16 (App. 2000), *citing Maricopa County Juvenile Action No. JV-508488*, 185 Ariz. 295, 300 (App. 1996).

b. Administrative Rules

The same principles of construction that apply to statutes also apply to administrative rules and regulations. Administrative rules need to be interpreted to yield a fair and sensible meaning. If possible, such rules should be harmonized with conflicting provisions of the code to which they apply. *Kimble v. City of Page*, 199 Ariz. 562, 565, ¶ 19 (App. 2001). Although the court gives deference to an agency's interpretation of a statute or regulation it is charged with enforcing, it is ultimately the responsibility of the judiciary to interpret the meaning and applicability of statutory and constitutional provisions. *State ex rel. Montgomery v. Mathis,* 231 Ariz. 103, 119 n. 16, ¶ 57 (App. 2012).

III. CONSTITUTIONAL PROVISIONS

The same principles of statutory construction apply when interpreting provisions of Arizona's constitution. Thus, the goal is to effectuate the intent of those who framed the provision. If the language of a provision of the constitution is unambiguous, the court generally must follow the text as written. When the words are plain and clear, judicial

construction is neither necessary nor proper, and the court will not consider any extrinsic matter supporting a construction that would vary the provision's apparent meaning. *Parker v. City of Tucson*, 233 Ariz. 422, 428-429, ¶ 13 (App. 2013). Undefined words in a constitutional provision are interpreted according to their natural, obvious, and ordinary meaning as understood and used by the people. *Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 406, ¶ 11 (App. 2001).

If the constitutional language is ambiguous, or a construction is urged which would result in an absurdity, the court may look behind the bare words of the provision to determine the conditions which gave rise to it and the effect which it was intended to have. The court interprets a constitutional amendment as a whole and in harmony with other portions of the Arizona Constitution. *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 109-110, ¶ 19 (App. 2012). Where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control. *Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 410, ¶ 28 (App. 2001). *See also* "More recent and specific governs over older and more general," section VII (b), *infra*, p. 16.

The court must respect and consider legislative findings, but whether state law prevails over conflicting state constitutional provisions is a question of constitutional interpretation within the exclusive province of the courts. *City of Tucson v. State*, 235 Ariz. 434, 439, n. 7, ¶ 17 (App. 2014). Where the language of a statute enacted pursuant to a constitutional provision closely tracks that constitutional provision, the same meaning will apply so as not to exceed the authority granted by the constitutional provision. If possible, the court construes statutes to avoid rendering them

unconstitutional. *Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 408, ¶ 19 (App. 2001).

In addition to the basic principles of construction and review, there are special principles regarding the interpretation and application of the portions of the Arizona Constitution and statutes pertaining to initiatives and the initiative process. Arizona has a strong policy of supporting the people's exercise of the power granted to them by the constitution to propose laws through initiative process. Thus, courts liberally construe initiative requirements and do not interfere with the people's right to initiate laws unless the Constitution expressly and explicitly makes any departure from initiative filing requirements fatal. *Parker v. City of Tucson*, 233 Ariz. 422, 429, ¶ 14 (App. 2013), *citing* Ariz. Const. art. IV, pt. 1, § 1(1), (2); *Pedersen v. Bennett,* 230 Ariz. 556, ¶ 7 (2012)(holding that in order for a former felon to circulate initiative petitions in Arizona, the circulator's civil rights must have been restored in the state in which he or she was convicted.)

IV. PROPOSITIONS

In construing the language of an initiative proposition passed by the electors of the state and enacted into statute, the court's primary objective is to give effect to the intent of the electorate. *State v. Siplivy*, 228 Ariz. 305, 307, ¶ 6 (App. 2011). Courts use the rules of statutory construction to determine the elector's intent. *State v. Gomez*, 212 Ariz. 55, 57 ¶ 11 (2006)(if language in a statute passed by initiative is ambiguous, courts will consider statute's context, language, subject matter, historical background, effects and consequences, and spirit and purpose). To this end, courts examine materials such as the statements of findings passed with the measure and the publicity pamphlet for

the initiative, which the Secretary of State distributes before the election. *Arizona Early Childhood Development & Health Bd. v. Brewer*, 221 Ariz. 467, 471, ¶ 14 (2009) (examining findings in publicity pamphlet to determine purpose), *citing Gomez*, 212 Ariz. at 59, ¶ 20.

V. ORDINANCES

Courts interpret city ordinances using the same rules of statutory construction. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 183, ¶ 33 (App. 2008). The court will presume an ordinance is valid unless it clearly appears otherwise. *State v. Seyrafi*, 201 Ariz. 147, 151, ¶ 18 (App. 2001)(property maintenance ordinance was unconstitutional in creating irrebuttable presumption that defendant was in control of properties). The court will avoid finding an ordinance invalid on the ground of conflict with a state statute if a reasonable interpretation of the ordinance will do so. *State v. Crisp*, 175 Ariz. 281, 284 (App. 1993)(city is permitted to punish prostitution more severely than the state; since no conflict existed between state statute and city ordinance prohibiting solicitation of prostitution, city ordinance not invalid).

VI. CASE LAW RE RULES OF STATUTORY CONSTRUCTION - GENERAL

The interpretation of statutes is reviewed de novo, and the primary goal is to fulfill the purpose of the statutory provisions at issue. If the statutory language is clear and unambiguous, the courts give it effect and do not employ other rules of statutory construction to discern the legislature's intent. The courts also consider the statutory scheme as a whole and presume that the legislature does not include statutory provisions that are redundant, void, inert, trivial, superfluous, or contradictory. *In Re Jessie T.*, 242 Ariz. 556, ¶ 13 (App. 2017)(plain language of animal cruelty statute

indicates that killing an animal does not constitute cruel mistreatment unless the killing causes protracted suffering). The goal is to fulfill the intent of the legislature. The best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction. *State ex rel. Montgomery v. Harris,* 234 Ariz. 343, 344, ¶ 8 (2014); *see also State v. Abdi*, 236 Ariz. 609, 611, ¶ 8 (App. 2015)(plain language of Arizona Medical Marijuana Act does not provide defense to caregiver with out-of-state registration card).

A statute must be interpreted according to the ordinary meaning of its terms unless a specific definition is given or the context clearly indicates that a special meaning was intended. When the language of a statute is clear and unambiguous, the court need not look further to determine the statute's meaning and apply its terms as written. Only if the language is unclear or ambiguous are the principles of statutory construction employed to determine the legislature's intent. *State v. Lee*, 236 Ariz. 377, 382, ¶ 16 (App. 2014).

When the language of a statute is reasonably susceptible to two differing interpretations, the court turns to secondary statutory construction methods to ascertain the unit of prosecution. This includes considering the legislative history of the statute, the statute's purpose, common law antecedents, the statute's context, structure, and effects, the statute's placement within the overall criminal statutory scheme, and complementary Arizona statutes. *State v. Jurden,* CR-15-0236-PR, ¶¶ 17-25 (July 1, 2016). Criminal statutes are interpreted in light of their common law antecedents, although Arizona has abolished common law crimes and defenses*. State v. Maverick Kemp Gray,* CR-15-0293-PR, ¶¶ 13-14 (June 20, 2016) (in enacting A.R.S. § 13-206(A)

the legislature generally codified common law rule that to raise entrapment defense, the accused must affirmatively admit, by testimony or other evidence, the substantial elements of the offense). Whether a defense should be more widely available is a policy judgment within the purview of the legislature rather than the courts. *Id*. at 21.

In construing a legislative enactment, the court applies a practical and commonsensical construction. *State v. Pledger*, 236 Ariz. 469, 471, ¶ 8 (App. 2015). A court will not apply clear terms of a statute literally if the result would be absurd. *Parker v. City of Tucson*, 233 Ariz. 422, 430, ¶ 20 (App. 2013). When a statute's meaning cannot be discerned from its language alone, the court must attempt to determine legislative intent by interpreting the statute as a whole, and consider the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose. The court must further consider a statute in light of its place in the statutory scheme, and although statutory title headings are not part of the law, they can aid in its interpretation. *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345, ¶ 13 (2014)(legislature intended to prevent impaired driving, thus term “metabolite” is limited to a proscribed substance's metabolites capable of causing impairment).

A result is absurd “‘if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.” *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345, ¶ 14 (2014), *quoting State v. Estrada*, 201 Ariz. 247, 251, ¶ 17 (2001). Although the court most commonly examines legislative history due to statutory ambiguity or absurdity, it is also well established that even where statutory language is “clear and unambiguous,” the court will not employ a “plain meaning” interpretation that would lead to a result at odds with

the legislature's intent. *State v. Estrada*, 201 Ariz. 247, 251, ¶ 19 (2001)(interpreting statute as mandating probation for smoking marijuana but permitting incarceration for possessing paraphernalia used to smoke it produces a transparently absurd result).

In reviewing a constitutional challenge to a statute, the court is guided by a strong presumption that it is constitutional. And, that presumption requires the challenging party to establish beyond a reasonable doubt that the statute violates some provision of the constitution. *State v. Brown*, 207 Ariz. 231, 236-237, ¶ 15 (App. 2004). Courts have a duty to save a statute, if possible, by construing it so that it does not violate the constitution, for example, by giving a narrowing construction to a facially overbroad statute. However, although courts properly construe statutes to uphold their constitutionality, courts cannot salvage statutes by rewriting them because doing so would invade the legislature's domain. *In re Nickolas S*., 226 Ariz. 182, 186, ¶¶ 17-18 (2011)(narrowing construction of facially overbroad teacher abuse statute to include only “fighting words”).

To the extent possible, the court avoids deciding constitutional issues if the case can be resolved on non-constitutional grounds. Additionally, if part of an act is unconstitutional and by eliminating the unconstitutional portion the balance of the act is workable, only that part which is objectionable will be eliminated and the balance left intact. Where the valid parts of a statute are effective and enforceable standing alone and independent of those portions declared unconstitutional, the court will not disturb the valid law if the valid and invalid portions are not so intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act. *State v. Rios*, 225 Ariz. 292, 296-297,

¶ 12 (App. 2010)(unconstitutional portion of legislative amendment had no operative language and thus did not undermine constitutionality of operative and unambiguous portion); *accord*, *State v. Montes*, 226 Ariz. 194, 198, ¶ 18 (2011).

Where the language of a statute enacted pursuant to a constitutional provision closely tracks that constitutional provision, the same meaning will apply so as not to exceed the authority granted by the constitutional provision. *Circle K Stores, Inc. v. Apache County*, 199 Ariz. 402, 408, ¶ 19 (App. 2001).

When the court examines a statute, it considers the statutory scheme as a whole and presumes the legislature did not include anything in the statute that is redundant, void, inert, trivial, superfluous, or contradictory. *State v. McDermott*, 208 Ariz. 332, 334-35, ¶ 5 (App. 2004). The court must give effect to each word or phrase of a statute and apply the usual and commonly understood meaning unless the legislature clearly intended a different meaning. The court must also read the statute as a whole, and give meaningful operation to all of its provisions. *State ex rel. Thomas v. Duncan*, 222 Ariz. 448, 450, ¶¶ 7, 8 (App. 2009). The court presumes the legislature states its meaning as clearly as possible and that if it wants to limit the application of a statute, it does so expressly. *State v. Sanchez*, 209 Ariz. 66, 70, ¶ 11 (App. 2004).

In interpreting a statute, the court must construe it together with other statutes relating to the same subject matter. *State v. Leonardo ex rel. County of Pima*, 226 Ariz. 593, 595, ¶ 8 (App. 2011)(statutes enacted pursuant to Victim's Bill of Rights established legislative intent that victim retain rights during defendant's term of probation and victim thus entitled to refuse interview in different cause number). *See also* "In para materia," section VII (c)(1), *infra*, p. 17.

A court will not rewrite statutes to effectuate a meaning different than the one the legislature intended. *Parker v. City of Tucson*, 233 Ariz. 422, 430, ¶ 20 (App. 2013); *see also In re Martin M.*, 223 Ariz. 244, 247, ¶ 9 (App. 2009)("we cannot rewrite a statute under the guise of divining legislative intent"); *Antonio P. v. Ariz. Dep't of Econ. Sec.,* 218 Ariz. 402, ¶ 13, 187 P.3d 1115, 1118 (App. 2008)("It is a universal rule that courts will not enlarge, stretch, expand, or extend a statute to matters not falling within its express provisions"). Courts will not enlarge the meaning of simple English words in order to make them conform to their own peculiar sociological and economic views. *State v. Huskie*, 202 Ariz. 283, 286, ¶ 10 (App. 2002).

Arizona is a "code state" and the courts are legislatively precluded from creating new crimes by expanding the common law through judicial decision. Thus, any expansion of the law in any particular area is the prerogative of the Arizona legislature, not of the courts. *State v. Lockwood*, 222 Ariz. 551, 555, ¶ 12 (App. 2009). *See also State ex rel. Montgomery v. Chavez ex rel. County of Maricopa*, 234 Ariz. 255, 258, ¶ 22 (2014)("Whether the disclosure requirements should be revised in light of technological advances is better addressed through a rule change or statutory amendment, either of which would allow broad input and consideration of the policy implications.")

It is not within the authority of the courts to amend a statute to correct what appears to have been legislative oversight. Rather, it is the legislature's place to correct any such oversight. *State v. Gonzalez*, 216 Ariz. 11, 14, ¶ 10 (App. 2007)(enhanced sentencing statute held not to apply because plain language did not encompass victim

under age 12; although legislature likely did not intend this omission, it was not court's job to impose sentence based on likely intent of the legislature).

VII. SPECIAL RULES OF STATUTORY CONSTRUCTION

a. Grammatical rules

The clear intent of the legislature takes precedence over grammatical rules. *Watts v. Arizona Dep't of Revenue*, 221 Ariz. 97, 102, ¶ 22 (App. 2009). But where no contrary legislative intent appears from the statute's language or context, courts may utilize grammatical rules to aid construction of an ambiguous statute. One general rule of syntax is that an initial modifier will tend to govern all elements in the series unless it is repeated for each element. Courts will employ this rule when its application does not conflict with other principles of statutory construction. *State v. Lewis*, 236 Ariz. 336, 345, ¶ 35 (App. 2014)(applying rule of syntax to burglary statue and concluding "fenced commercial or residential yard" refers to fenced commercial or fenced residential yards, and does not include unfenced residential yards).

The word "or" as it is often used, is a disjunctive particle used to express an *alternative* or *to give a choice* of one among two or more things. The court will usually interpret "or" to mean what it says and we will give it that meaning unless impossible or absurd consequences will result. *Boynton v. Anderson*, 205 Ariz. 45, 49, n. 2, ¶ 15 (App. 2003)(luring a minor for sexual exploitation, though not a dangerous crime against children for purposes of penalty enhancement statute, is nonetheless punishable under that sentencing scheme based on provision making enhanced penalties applicable to dangerous crimes against children "or" luring a minor for sexual exploitation).

b. More recent and specific governs over older and more general

When two conflicting statutes cannot be harmonized and operate contemporaneously, the more recent, specific statute governs over an older, more general statute. *State v. Jones*, 235 Ariz. 501, 503, ¶ 8 (2014). Although it may not always be clear which statute is more specific, it is always clear which statute is more recent. But even if the statutes are equally specific, the more recent statute should govern unless the legislature clearly indicated otherwise. *Id.*, ¶ 11 (conflict between statute barring imposition of consecutive sentences for single act or omission and statute mandating consecutive sentences for all dangerous crimes against children reconciled in favor of latter statute so as to authorize imposition of consecutive sentences for murder and child abuse; even if statutes were equally specific, statute mandating consecutive sentencing was the more recent statute that was enacted by Legislature without acknowledging statute barring consecutive sentencing).

When there is conflict between two statutes, the more recent, specific statute normally controls over the older, more general statute. In effect, the specific statute creates an exception or qualification to the general statute. But this principle applies only when two statutes actually conflict. A conflict arises when the elements of proof essential to find guilt under the specific statute are identical to the elements of proof essential to find guilt under the general statute. *State v. Gagnon*, 236 Ariz. 334, 345-346, ¶ 7 (.App. 2014)(trafficking statute, criminalizing disposing of stolen property and applicable under broad set of circumstances, does not conflict with false representation statute, focusing on act of providing false information to pawnbroker or second hand dealer; thus, false representation statute does not preempt trafficking statute when

stolen property is sold in a pawn transaction). Moreover, when a defendant can be prosecuted under two separate statutes for the same conduct, the prosecutor has discretion to determine which statute to apply so long as that election does not discriminate against a particular class of defendants. *Id*. at 345, ¶ 10.

c. Fun with Latin

1. In pari materia

When a statute is ambiguous, the court may consider both prior and subsequent statutes *in pari materia*. *State v. Fikes*, 228 Ariz. 389, 391, ¶ 9, 267 P.3d 1181, 1183 (App. 2011). Statutes that are *in pari materia* – those that relate to the same subject matter or have the same general purpose as one another – should be construed together as though they constitute one law. *Phoenix City Prosecutor's Office v. Nyquist*, WL 4054134, ¶ 9 (September 14, 2017), *citing State v. Gamez*, 227 Ariz. 445, 449, ¶ 27 (App. 2011)(A.R.S. §§ 13–1405 and 13–1407(B) must be read *in pari materia*; requiring the state to establish a defendant's knowledge of a victim's age to convict him of sexual conduct with a minor would render § 13–1407 inoperable); *accord* Div. 2, *State v. Falcone*, 228 Ariz. 168, 171-172, ¶ 14 (App. 2011). The *pari materia* rule of construction applies even where the statutes were enacted at different times, and contain no reference one to the other. *State ex rel. Thomas v. Ditsworth*, 216 Ariz. 339, 342, ¶ 12 (App. 2007). *See also State v. Leonardo ex rel. County of Pima*, 226 Ariz. 593, 595, ¶ 8 (App. 2011)(statutes enacted pursuant to Victim's Bill of Rights established legislative intent that victim retain rights during defendant's term of probation and victim thus entitled to refuse interview in different cause number).

2. Ejusdem generis

The *ejusdem generis* rule of construction provides that general words which follow the enumeration of particular classes of persons or things should be interpreted as applicable only to persons or things of the same general nature or class. *State v. Barnett*, 209 Ariz. 352, 355, ¶ 15 (App. 2004)(defendant on release status not prohibited possessor because he did not have requisite prior conviction: "The general nature or class at issue includes those 'serving a term' of 'probation' or 'parole, community supervision, work furlough, [or] home arrest.' … A person on any of those forms of release must have been first convicted of an offense before being later released to one of the listed types of release. The same, it follows, would be true of one 'release[d] on any other basis,' such as release pending appeal.").

Courts generally apply this rule to aid in the interpretation of statutes that include a list or series of specific, but similar, persons or things. *Bilke v. State*, 206 Ariz. 462, 465, ¶ 13, 80 P.3d 269, 272 (2003)(*ejusdem generis* rule did not apply to statute permitting appeal of interlocutory judgment when only issue was amount of recovery, whether through "an accounting or other proceeding"; legislature did not create list of specific or similar things from which court could infer intention to narrow the subsequent general class of "other proceedings."). This rule provides that general words following the enumeration of particular classes of persons or things should be interpreted as applicable only to persons or things of the same general nature or class as the terms specifically listed. *See*, *e.g.*, *In re Julio L.*, 197 Ariz. 1, 4, ¶ 11, 3

P.3d 383, 386 (2000)(finding the term “seriously disruptive” should be interpreted in light of the preceding specific categories of “fighting” and “violent” behavior).

3. Expressio unius est exclusio alterius

Under the principle of *expressio unius est exclusio alterius,* expression of one or more items of a class and the exclusion of other items of the same class implies intent to exclude those items not so included. *Rash v. Town of Mammoth*, 233 Ariz. 577, 580-581, ¶ 6 (App. 2013)(pursuant to the principle of *expressio unius est exclusio alterius*, list of procedural rules applicable to statutory special actions included rules applicable to parties, procedure, interlocutory orders and stays, and judgments, but did not include special appellate court provisions). *See also State v. Fell*, 203 Ariz. 186, 189, ¶ 11 (App. 2002)(under the established rule of statutory construction, *expressio unius est exclusio alterius,* the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed). The rule serves only as an aid in determining the intent of the legislature and should not be applied when context and public policy contradict. *State v. Williams*, 209 Ariz. 228, 236, ¶ 31, 99 P.3d 43, 51 (App. 2004)(legislature's intent in enacting rule was to expand, not limit, list of applicable sexual offenses previously established in common law, and narrowing scope of offenses would lead to unintended, if not absurd, result).

The rule is not definitive or an invariable standard of interpretation, but if a statute specifies under what conditions it is effective, the court will ordinarily infer that it excludes all others. *Boynton v. Anderson*, 205 Ariz. 45, 47-48, ¶ 8, 66 P.3d 88, 90-91 (App. 2003)(offense of luring a minor for sexual exploitation, which is not listed as a dangerous crime against children in statute providing enhanced penalties for such

crimes, is not a “dangerous crime against children” for sentencing purposes). *See also In re Martin M.*, 223 Ariz. 244, 246, ¶ 8 (App. 2009)(had the legislature intended to require the juvenile court to transmit to MVD the record in all delinquency adjudications, it readily could have done so).

In *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361, 368, 332, ¶ 31 (App. 2014), *review granted*, the Court held the defendant did not waive the protection afforded by the Arizona Medical Marijuana Act for the medical use of marijuana by accepting a term of probation that precluded the possession or use of illegal drugs, finding:

> The canon of construction *expressio unius est exclusio alterius* applies with particular force in this context, given that Arizona voters were well aware marijuana would remain criminalized except as specifically provided in the AMMA. Against this backdrop, it is therefore clear that neither state prosecutors nor judges may read exceptions into the law where none exist, thereby contravening the plain terms of the AMMA and usurping the legislative authority exercised by, and ultimately reserved for, the people.

Where the language of a statute contains a list prefaced by “including,” the word “including” denotes the list is illustrative, *i.e.*, examples illustrating the application of the general principle, and not an exclusive list. Thus, the fact that a term is not set forth in the examples in a statute does not itself establish that the legislature intended to exclude it from the list. *State v. Leonardo ex rel. County of Pima*, 226 Ariz. 593, 595, ¶ 9 (App. 2011). Nonetheless, a broader review of related statutes may establish legislative intent to exclude a term in such a list. *Id.,* ¶¶ 10-11 (statutes enacted pursuant to Victim’s Bill of Rights established legislative intent that victim retain rights during defendant's term of probation and victim thus entitled to refuse interview in different cause number).

D. Rule of Lenity

A.R.S. § 1-211 abrogated the common-law rule that penal statutes must be strictly construed, and instead mandates that they be construed "according to the fair import of their terms, with a view to effect their object and to promote justice." Nonetheless, the "rule of lenity" requires that if a criminal statute is ambiguous and susceptible to more than one interpretation, any doubt should be resolved in favor of the defendant. *State v. Sanchez*, 209 Ariz. 66, 70, ¶ 15 (App. 2004)("Because § 13–921 is equally susceptible to each interpretation the parties have urged here, we are guided by the rule of lenity to resolve the statute's ambiguity in favor of the defendant.").

The first essential of due process is fair warning of the act which is made punishable as a crime. When the meaning of a statute is unclear or subject to more than one interpretation, the rule of lenity requires the court to resolve any ambiguity in favor of the defendant. *State v. Lockwood*, 222 Ariz. 551, 553, ¶ 4 (App. 2009)(under rule of lenity, stillborn fetus not "dead human body" under statute criminalizing abandonment or concealment of a human body). *See also State v. Barnett*, 209 Ariz. 352, 355, ¶ 16 (App. 2004)(rule of lenity supported interpretation that person must be "serving a term," rather than on release status, in order to be "prohibited possessor").

The rule of lenity, however, is a construction principle of last resort. The court will only resolve ambiguity in favor of a defendant if the statutory language is unclear and other forms of statutory construction have failed to reveal the legislature's intent. *State v. Bon*, 236 Ariz. 249, 253, ¶ 13 (App. 2014)(term "external boundaries" not ambiguous so as invoke rule of lenity; thus, truck bed is a "structure" for purposes of third-degree burglary). It is only when the ambiguity persists after applying tenets of statutory

construction that the rule of lenity is triggered, requiring the ambiguity to be resolved in favor of the defendant. *Cicoria v. Cole*, 222 Ariz. 428, 432, ¶ 20 (App. 2009)(rule of lenity did not apply to require state to prove blood alcohol content at time of driving). *See also State v. Fell,* 203 Ariz. 186, 189 ¶ 10 (App. 2002)(rule of lenity did not apply to extend justification defense to DUI prosecutions brought under Title 28).

In interpreting Victim's Rights statutes, an assertion that the rule of lenity should apply must be balanced against the legislative directive which specifically instructs the courts to construe Victim's Rights statutes "liberally ... to preserve and protect the rights to which victims are entitled." *State v. Leonardo ex rel. County of Pima*, 226 Ariz. 593, 595, n. 1, ¶ 6 (App. 2011)(statutes enacted pursuant to Victim's Bill of Rights established legislative intent that victim retain rights during defendant's term of probation and victim thus entitled to refuse interview in different cause number).

E. Amendments as Change or Clarification of Law

The legislature is presumed to be aware of existing law when it enacts or modifies a statute. *Hall v. United States*, 132 S. Ct. 1882, 1889 (2012); *MacKinney v. City of Tucson*, 231 Ariz. 584, 587, ¶ 9 (App. 2013), *citing State v. Garza Rodriguez*, 164 Ariz. 107, 111, 791 P.2d 633, 637 (1990). *See also State v. Slayton*, 214 Ariz. 511, 516, ¶ 19 (App. 2007)("Because we presume that the legislature understood what it was doing when it enacted these statutes, we conclude the statutory history clearly reflects a legislative intent not to require the existence of any culpable mental state within 17–309(A), except when the text plainly requires.")

The legislature is also presumed to be aware of the existing case law, and if it revises a statute and retains the language on which the appellate courts have based

their decisions, the legislature is presumed to agree with the court's interpretation of the statute. *State v. McDermott*, 208 Ariz. 332, 335, ¶ 9 (App. 2004)(in amending weapons misconduct statute, legislature presumed aware of, and not disagreeing with, case law holding that fanny pack not included in definition of "luggage"). Under the "legislative acquiescence" doctrine, when a statute construed by a court of last resort is reenacted in substantially the same terms, the legislature is presumed to have approved the judicial construction and to have adopted such construction for the reenactment of the statute. However, it must be the court of last resort, not an intermediary appellate court. *State v. Jones*, 235 Ariz. 501, 503, ¶ 14, 334 P.3d 191, 193 (2014).

Under the rules of statutory construction, when the legislature modifies the language of a statute, there is a presumption that the legislature intended to make a change in the existing law. *State v. Averyt,* 179 Ariz. 123, 128, 876 P.2d 1158, 1163 (App.1994). *See also Lambertus v. Porter*, 235 Ariz. 382, 387, ¶ 28 (App. 2014)("The legislative decision to omit 'visitation' in § 25–404 therefore reflects the intent to exclude nonparents from those who have the right to obtain temporary orders for visitation."); *State v. Gray,* 227 Ariz. 424, 429 n. 5, ¶ 15, (App. 2011) ("To the extent the legislature omitted references to attempted persuasion of a witness found in previous statutes, we presume such omissions were intentional.").

The court presumes that when the legislature alters the language of a statute, it intended to create a change in the existing law. *In re Paul M.*, 198 Ariz. 122, 124, ¶¶ 4, 6 (App. 2000)(legislature's amendment of statute defining teacher abuse reflected legislature's intention that insulting words alone should no longer qualify as criminal abuse). This presumption also applies to rules promulgated by the Arizona Supreme

Court. *In re Victoria K*., 198 Ariz. 527, 532, ¶ 25 (App. 2000)("When the Arizona Supreme Court modifies the language of a rule, a presumption exists that a change in the existing rule was intended."). Courts presume that the legislature, knowing the existing law, does not intend to enact meaningless, redundant, or futile legislation. *State v. Box*, 205 Ariz. 492, 496, ¶ 10 (App. 2003); *see also State v. Christian*, 205 Ariz. 64, 69, n. 11, ¶ 15 (2003)(noting "We assume the statute was amended to correct a problem.").

There are exceptions to the general presumption that when the legislature amends the language of a statutory provision, it intends that the change have meaning. First, when statutes are changed as part of a recodification and the function of the new statute is identical in form to the former provision, it is presumed the legislature meant to continue the same intent, even when the language of the new statute is not identical to the former. *State v. Kelly*, 210 Ariz. 460, 462, ¶ 8 (App. 2005)(change in and renumbering of Arizona's prohibited possessor statute was part of the comprehensive adoption of the entirely new revised criminal code effective in 1978).

Secondly, subsequent changes to a statute that merely clarify or construe the statutory language are not viewed as the legislature's intent to change existing law; rather, they are seen as a strong indication of the legislature's original intent. *Cicoria v. Cole*, 222 Ariz. 428, 431-432, ¶ 19 (App. 2009); *see also State v. Barragan-Sierra*, 219 Ariz. 276, 283, ¶ 21, 196 P.3d 879, 886 (App. 2008)(an amendment which, in effect, merely clarified or interpreted a prior statute will be accepted as the legislative declaration of the original act.).

In determining whether the amendment was meant to change or clarify the existing law, the usual presumption that an amendment changes rather than clarifies a statute is only applicable when the statute was not ambiguous prior to its amendment. *State v. Sweet*, 143 Ariz. 266, 269 (1985). If the original statute was ambiguous, the amendment will not be viewed as a change to existing law, but merely a clarification of the legislator's original intent. *Sempre Ltd. P'ship v. Maricopa Cnty*., 225 Ariz. 106, 110, ¶ 17 (App. 2010) (noting that a portion of the prior statute was ambiguous and "the usual presumption that an amendment changes the meaning of a statute" did not apply).

When the legislature wants to make a subsequent measure retroactive, it does so explicitly. *State ex rel. Montgomery v. Harris ex rel. County of Maricopa*, 232 Ariz. 34, 35, ¶ 7 (App. 2013). An amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act. But this rule of statutory interpretation applies only when the original statute is ambiguous. Once published, an appellate court's interpretation becomes part of the statute. A retroactive amendment can not be used to abrogate a prior case interpreting the statute. *State v. Fell*, 210 Ariz. 554, 560-561, ¶¶ 24-25 (2005). The doctrine of separation of powers does not permit the court to accept legislative messages regarding the meaning of its past actions. However, where the unconstitutional portion of a legislative amendment has no operative language and does not undermine the constitutionality of the operative and unambiguous portion, the amendment will be upheld. *State v. Montes*, 226 Ariz. 194, 198, ¶ 18 (2011)(portion of legislative act providing for retroactive application of prior amendment to self-defense statute, stating that its purpose was to clarify that the

legislature intended to make prior amendment retroactively applicable, did not render the legislative act violative of separation of powers doctrine, as provision setting forth purpose contained no operative language).

F. Presumption against repeal by implication

The courts will avoid a conclusion that by enacting a new statute, the legislature has repealed another statute by implication. Absent a clearly expressed legislative intention, repeals by implication are not favored and will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter statute covers the whole subject of the earlier one and is clearly intended as a substitute. *Branch v. Smith*, 538 U.S. 254, 273 (2003). *See also: Pijanowski v. Yuma County*, 202 Ariz. 260, 263, ¶ 14 (App. 2002)(modification-by-implication is disfavored and courts will not find such an intent unless the interplay between the statutes under consideration compels a finding that the legislature must have intended the later statute to impliedly repeal the earlier one); *State v. Torrez*, 141 Ariz. 537, 539-540 (App. 1984)(repeal by implication of one statute by another is not favored unless it is clear from the inherent inconsistency of the two statutes that the legislature intended that the earlier statute be repealed).

The court must presumptively attempt to harmonize newer statutes with previous ones and disfavor repeal by implication. *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361, 368, ¶ 29 (App. 2014). Courts only properly consider repeal by implication if the existing statutes cannot be harmonized. *Hounshell v. White*, 219 Ariz. 381, 387 ¶ 24 (.App. 2008). Where statutes are clear and function harmoniously, it is not appropriate to consult legislative history and then use that history as a basis upon which to find an implicit repeal. The law is the legislation, not the fact sheets or bill summaries.

Hounshell v. White, 219 Ariz. 381, 388, ¶ 24 (.App. 2008); s*ee also In re Adam P.,* 201 Ariz. 289, 291, ¶¶ 12–13 (App. 2001)(refusing to consider an argument based on legislative fact sheets where the statute was clear).

When two statutes conflict, the court will adopt a construction that reconciles them whenever possible, giving force and meaning to each. *State v. Jones*, 235 Ariz. 501, 502, ¶ 6 (2014). *See also: Kimu P. v. Arizona Dept. of Economic Sec*, 218 Ariz. 39, 43, ¶ 16 (App. 2008); *UNUM Life Ins. Co. of America v. Craig*, 200 Ariz. 327, 333, ¶ 28 (2001), *citing State v. Tarango,* 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996).

A statue may be implicitly repealed, however, in one of two instances. The first is when a statute is unavoidably inconsistent with another more recent or more specific statute. *Hounshell v. White*, 219 Ariz. 381, 386, ¶ 13 (App. 2008), *citing UNUM Life Ins. Co. of America*, 200 Ariz. at 333, ¶¶ 28-29, 26 P.3d at 516 (where "two conflicting statutes cannot operate contemporaneously" the more recent or more specific statute governs). *See also State v. Jones*, 235 Ariz. 501, 503, ¶¶ 8, 11 (2014)(when two conflicting statutes cannot be harmonized and operate contemporaneously, the more recent, specific statute governs over an older, more general statute; although it may not always be clear which statute is more specific, it is always clear which statute is more recent, but even if the statutes are equally specific, the more recent statute should govern unless the legislature clearly indicated otherwise).

The second is when two statutes cover the same subject matter and the earlier statute is not explicitly retained by the later statute. *Hounshell v. White*, 219

Ariz. 381, 386, ¶ 13 (App. 2008), *citing* A.R.S. § 1-245,[3] and *Olson v. State,* 36 Ariz. 294 (1930)(repeal by implication results where the subsequent statute deals with "the same subject matter" as the earlier consistent statute).

Finally, under A.R.S. § 1-252:

> The repeal or abrogation of a statute, law or rule does not revive the former statute, law or rule theretofore repealed or abrogated, nor does it affect any right then already existing or accrued at the time of such repeal, nor any action or proceeding theretofore taken, except such as may be provided in the subsequent repealing statute, nor shall it affect any private statute not expressly repealed thereby.

[3] A.R.S. § 1-245 provides: "When a statute has been enacted and has become a law, no other statute or law is continued in force because it is consistent with the statute enacted, but in all cases provided for by the subsequent statute, the statutes, laws and rules theretofore in force, whether consistent or not with the provisions of the subsequent statute, unless expressly continued in force by it, shall be deemed repealed and abrogated."